No.

IN THE SUPREME COURT OF THE UNITED STATES

LEOBARDO VALLADARES,

Petitioner,

v.

CRAIG KOENIG, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Prosecution Fail to Prove Beyond a Reasonable Doubt That Valladares Committed First Degree Murder?

II. Did Trial Counsel Render Ineffective Assistance by Failing to Investigate and to Present a Trauma Expert?

III. Did the California Courts' Unreasonable Refusal to Hold a Federal Evidentiary Hearing, Entitle Valladares to an Evidentiary Hearing?

IV. Did the Trial Court Deprive Valladares of Due Process and a Fair Trial by Prejudicially Instructing the Jury with CALCRIM Nos. 3472 and/or 3474?

V. Did the Trial Court's Failure to Issue a Unanimity Instruction Deprive Valladares of Due Process and a Fair Trial?

VI. Did the Trial Court's Refusal to Allow the Jury to Test Fire the Gun Deprive Valladares of Due Process and a Fair Trial?

VII. Did the Cumulative Effect of the Errors Render Valladares' Trial Unfair?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

LEOBARDO VALLADARES,
Petitioner,
v.
CRAIG KOENIG, Warden,
Respondent.

Petitioner, **LEOBARDO VALLADARES**, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's April 21, 2021 Order denying Valladares' request for a certificate of appealablity. (Appendix A)

OPINION BELOW

On April 21, 2021, the Ninth Circuit Court of Appeals denied Valladares' request for a certificate of appealablity. (Appendix A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

The district attorney charged Valladares with the September 2013 murder of Francisco Torres. Cal. Penal Code § 187(a). The prosecutor also alleged Valladares discharged a firearm. Cal. Penal Code § 12022.53(d).

The jury found Valladares guilty as charged and found the firearm enhancement true. The trial court sentenced Valladares to fifty years to life in state prison.

Valladares timely appealed. (Case No. G052613.) On August 31, 2017, the CCA denied Valladares' direct appeal. Valladares next filed a petition for review in the California Supreme Court. (No. S244602) On December 13, 2017, the CSC denied review. (Appendix C)

Valladares filed a petition for writ of habeas corpus with his direct appeal. (G053913) On August 31, 2017, the CCA denied Valladares' habeas petition. Valladares next filed a petition for review in the California Supreme Court. (No. S244604) On December 13, 2017, the CSC denied review.

Valladares filed a habeas petition in the federal district court. On January 19, 2020, the federal district court denied the

petition. (No. 8:19-cv-00487-JLS-JDE) (Appendix B)

On April 21, 2021, the Ninth Circuit denied Valladares' request for a Certificate of Appealability. (Appendix A)

FACTUAL AND PROCEDURAL BACKGROUND[1]

> On the evening of September 14, 2013, Maria Huerta arranged to meet her friend Valladares at a Stanton bar where they met weekly to drink and listen to music. Valladares, a regular patron of the bar, was friendly and respected by the waitresses and other staff.
>
> When Huerta arrived, Valladares stood in front of the bar talking to friends. After about 30 minutes, Huerta and Valladares walked inside. They each consumed six beers over the next two hours. Huerta did not feel intoxicated or "buzzed," and Valladares did not appear intoxicated.
>
> According to Huerta, around the 2:00 a.m. closing time, a waitress who knew Valladares complained to him that Francisco Torres was being rude and disrespectful to her. The waitress, Azucena Mendoza, testified she knew Vallardares as a regular of the bar. At some point during the evening, she was walking and holding beer bottles when Torres, who had been sitting at the bar, got up, grabbed her elbow or bicep, and asked her to bring him a beer. When he pulled on her arm, she thought he was going to fall. He also wanted her to sit and have a drink with him. Mendoza declined to get Torres another beer because he was drunk. He insulted her, called her names, and said she was a "whore." A security guard intervened and Mendoza walked over to Valladares's table to

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[1] The facts, taken from the California Court of Appeal's written decision on direct review are presumed correct. 28 U.S.C. § 2254(e)(1); *Slovik v. Yates,* 556 F.3d 747, 749 n.1 (9th Cir. 2009).

calm down. She told Valladares, who did not appear intoxicated, what happened, pointed Torres out and described how Torres had frightened and insulted her.

A few minutes later, Huerta, Valladares, Mendoza and another waitress exited the bar, where they spoke for about a minute. At some point, Valladares said he was going to talk to Torres about disrespecting Mendoza. Mendoza, who returned to the bar, may have told him not to do it, and not to get involved. Huerta and Valladares remained outside chatting with others who emerged, and smoking cigarettes.

Huerta testified when Torres exited the bar, Valladares told Huerta, "wait for me here. I'm going to go talk to him." Valladares did not seem agitated. Torres walked out of the bar alone and down the sidewalk in front of an adjacent laundromat. Valladares followed Torres.

When Valladares caught up to Torres the men began arguing. Torres shoved Valladares against a glass window and Valladares fell to the ground. Valladares got up after Torres shoved him, and attempted to shove Torres back, but Torres moved out of the way. Torres approached Valladares in a fighting or defensive stance. Valladares then pulled out a gun from his belt area, pointed it at Torres's face, and fired from about 12 inches away. Torres fell down lying face up. Valladares shot Torres in the chest, put the gun in his waistband, and took off running.

Huerta testified she heard only one shot, but told a police officer a day after the incident she thought she heard two shots. She saw Valladares's hand shake or "pull back" twice. The second time was within a split second of the first; there was no "pause in between seeing his hand shake the first time and the second time." Huerta described the gun as a "gold, brown" revolver.

Surveillance video showed Valladares and Huerta standing by the door around 1:50 a.m., chatting, smoking, and interacting with various people who emerged form the bar. Valladares moved over to a planter area and continued to smoke and conversed with various men. At about 1:54 a.m., Valladares walked over to the bar door as Torres emerged. Valladares followed Torres as he walked north along the sidewalk abutting the bar and other businesses in the strip mall. The men conversed or argued for about 20 seconds, during which Valladares gestured back toward the bar. Suddenly, Torres punched or shoved Valladares, who stumbled backward and out of the frame. Torres approached Valladares with his hands raised in a fighting position. Valladares regained his footing and the men threw a few punches at each other as Valladares danced around. Although the video does not clearly show this part of the incident, Valladares removed his gun and shot Torres, who fell on his back with his head hanging off the curb. Valladares walked quickly away after the shooting, followed by Huerta.

The evidence established Valladares fired two rounds, one striking Torres in the left eye, and another striking him in the middle right side of the chest. The injury to the eye had stippling, or unburned gunpowder, around the entry point, suggesting the gun had been fired at close range. Both wounds were fatal, and Torres bled to death. Less than nine seconds had elapsed since Torres punched or shoved Valladares. Investigators found no weapons on or around Torres's body, and Torres did not have cuts or bruises on his hands. Torres's blood alcohol content registered at 0.20 percent.

Samuel Carcamo, who knew Valladares from the bar, testified Valladares pulled out the gun, pointed it at Torres's forehead, and fired. Torres went down. Valladares started to walk away, but then "took a step back, and . . . shot [Torres] again,"

this time in the stomach.

Investigators found Valladares's broken cell phone on the ground near Torres's body. Four days after the shooting, deputies arrested Valladares at a relative's home. Interviewed at the sheriff's department, Valladares denied having a gun or shooting Torres, even after investigators showed him surveillance video and told him witnesses identified him as the shooter. He explained he walked toward some people near the video store when he saw people arguing. A man he did not know said "what" to him, and he replied, "what's up?" The man struck him, causing him to hit the window and fall down, dropping his cell phone. He denied seeing the person previously in the bar. "Somebody fired," a gun, but he did not know who, and he saw someone "laying there." He walked to a friend's home because he did not want problems with the police, as he previously had been deported. Valladares claimed he had six beers before he arrived at the bar, two more at the bar, and was "a little drunk."

REASONS TO GRANT CERTIORARI

I. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT VALLADARES COMMITTED FIRST DEGREE MURDER

The prosecution failed to prove that Valladares committed premeditated, deliberate first degree murder. See *Jackson v. Virginia,* 443 U.S. 307, 317-320 (1979). The killing resulted from a spontaneous fistfight, during which Torres threw the first punch. After hitting Valladares and knocking him to the ground, Torres again approached Valladares. Then, Valladares fired.

The RR finds that the California Court of Appeal (CCA) reasonably found that Valladares approached Torres armed with a concealed gun knowing that if things went awry he could shoot and kill someone. RR 14. The RR finds that Valladares had a motive to kill Torres because, *inter alia*, he needed to "uphold his reputation as a respected patrol who could resolve problems." RR 14.

Valladares disagrees. Valladares never came to the bar intending to kill anyone. He did not bring the gun to kill anyone. He carried a loaded gun because the Oasis bar had a history of altercations. (2RT 171, 172, 184, 188). He did not know Torres

would harass a waitress, that the waitress would complain to him and that Torres would physically attack him. Valladares fired the gun only after Torres approached him.

The RR finds that the manner of killing, namely, that Valladares fired two shots supports a finding of premeditation and deliberation. RR 14. Valladares disagrees. The killing resulted from the culmination of an argument, struggle, and/or a rash and impulsive act. The killing resulted from a "mere unconsidered or rash impulse hastily executed." *People v. Anderson,* 70 Cal.2d 15, 26, 27 (1968). Valladares killed Torres because Valladares feared for his life not because of an intentional, deliberate pre-existing plan to kill Torres. Cf., *United States* v. *Lentz,* 383 F.3d 191,203 (4th Cir. 2004) (Lentz lured Doris to his home and killed her to avoid splitting their marital assets.)

II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND TO PRESENT A TRAUMA EXPERT

Expert opinion would have proved that Valladares acted from an instinctual, survival reaction and did not premeditate the killing. A trauma expert would have testified that Valladares

acted consistently with an extreme fight-flight reaction secondary to palpable, perceived fear for his life. (Exh. A ¶ 2)[2] The jury would have found Valladares not guilty of murder if the jury understood Valladares' state of mind when Torres attacked him. Trial counsel's inexplicable failure to call a trauma expert deprived Valladares of the effective assistance of trial counsel. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

The RR finds that the California Supreme Court's rejection of his claim was not contrary to *Strickland* because *Strickland* affords trial counsel deference. RR 33-34. The RR then attacks Dr. Booker's report as based on the facts from the opening brief. The RR finds that the opening brief was "not in existence at the time of trial." RR 36. The RR overlooks that the statement of facts in the opening brief was taken directly from the trial transcripts. The trial transcripts reflect the facts elicited at trial. The opening brief contains citations to the record on appeal. The facts in the record on appeal were in existence at trial.

The RR disputes Dr. Booker's opinion and speculates about

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[2] The Exhibits referenced refer to the exhibits attached to Valladares' habeas petition. (Dkt. 2)

trial counsel's tactical reasons for failing to call a trauma expert. RR 36-37. The RR speculates that the prosecutor would have, through cross-examination, highlighted the incriminating testimony against Valladares and the prosecution would have called a rebuttal expert to highlight the choices Valladares made. RR 37.

Valladares disagrees. Dr. Booker would have opined that Valladares' perceived fear would have led to autonomic-nervous-system activation, causing an acute survival response, namely, flight. (Exh. A at 6) Dr. Booker would have testified that "Valladares suffered from an extreme fight-flight reaction secondary to palpable, perceived fear for his life. He reacted instinctively to extinguish the threat in one contiguous shooting. Even though two shots were fired, the number of shots was inconsequential to the episode. Once the episode, and fight flight system engaged, the "switch" was activated and could not be consciously deactivated." (Exh. A at 6)

The RR speculates, without any proof such as a counter declarations from an expert, from the prosecutor, or even trial counsel, that, because the prosecutor would have cross-examined

the trauma expert and would have called a prosecution expert to counter the defense trauma expert, no *Strickland* error resulted. RR 36-37.

Valladares disagrees. When determining whether counsel conducted a reasonable strategy, courts may not "indulge in 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011)

The RR finds no prejudice resulted from trial counsel's failure to present a trauma expert and the California Supreme Court reasonably rejected Valladares' claim. RR 37. Valladares disagrees because prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. The errors should be considered cumulatively to assess prejudice. *Id.* at 695, 696; *Silva v. Woodford,* 279 F.3d 825, 834 (9th Cir. 2002).

Valladares did not initiate the altercation. After Valladares approached and spoke to Torres, Torres violently punched Valladares with such force that he knocked Valladares to the

ground. Valladares got up and Torres again approached Valladares. Valladares then shot Torres twice. (Exh. A ¶ 3) A trauma expert would have explained that Valladares acted from a self-defense/self-preservation instinct.

Trial counsel's performance fell below an objective standard of reasonableness and prejudice resulted, namely, "'"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' " See *Strickland,* 466 U.S. at 688, 694.

III. THE CALIFORNIA COURTS' UNREASONABLE REFUSAL TO HOLD A FEDERAL EVIDENTIARY HEARING, ENTITLES VALLADARES TO AN EVIDENTIARY HEARING

The RR finds no evidentiary hearing necessary because the record refutes Valladares' factual allegations and the AEDPA requires federal courts to review state court decisions based on the record before the state court. RR 38.

Valladares disagrees. Valladares sought an evidentiary hearing at every level of the state habeas proceedings and again in federal court. The California courts should have held an evidentiary hearing to allow Valladares to call trial counsel as a

witness and prove that trial counsel rendered ineffective assistance. See, e.g., *People v. Pope*, 23 Cal.3d 412, 426 (1979) (An evidentiary hearing allows trial counsel to fully describe "his or her reasons for acting or failing to act in the manner complained of.")

Valladares made a prima facie showing for ineffective assistance of counsel supported by the record. Assuming the record and other evidence to be true (see *Cullen v. Pinholster*, 563 U.S. 170, 188 (2001)) nothing more was required. See *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003).

Because no AEDPA deference is due under 2254(d)(2) or (e)(1) where the state has made an "unreasonable" determination of the facts, no deference is due in federal court to the state court's disputed findings of fact. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("Where a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts.").

Because the California courts unreasonably denied Valladares' claim without holding an evidentiary hearing, this

Court should hold an evidentiary hearing. See *Pinholster*, 563 U.S. at 183-184 (evidentiary hearing may be proper where § 2254(d) does not preclude habeas relief); *Harrington v. Richter*, 562 U.S. at 86 (where petitioner satisfies § 2254(d), claim may be relitigated in federal court); *Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011)(where state court decision not entitled to AEDPA deference, even after *Pinholster* it was still proper for district court to hold evidentiary hearing); *see also Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005) (evidentiary "hearing is required if: '(1) [the defendant] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts'")(quoting *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004)).

IV. THE TRIAL COURT DEPRIVED VALLADARES OF DUE PROCESS AND A FAIR TRIAL BY PREJUDICIALLY INSTRUCTING THE JURY WITH CALCRIM NOS. 3472 AND/OR 3474

Over defense objection, the trial court erroneously issued two instructions, namely CALCRIM No. 3472 ("Right to Self-Defense: May Not Be Contrived") and CALCRIM No. 3474 ("Danger No Longer Exists or Attacker Disabled"). The evidence

failed to support CALCRIM No. 3472 because Valladares never provoked a fight or quarrel with the intent to create an excuse to use force. The evidence failed to justify CALCRIM No. 3474 because the danger from Torres never dissipated. Valladares' right of self-defense continued during both shots, not just the first shot as the prosecutor argued.

The RR recognizes that an instructional error rises to a cognizable federal claim if the error "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). RR 15.

But, the RR finds that the CCA correctly found no error nor due process violation occurred because the evidence supported the instruction. RR 19-20. Valladares disagrees. The CCA unreasonably found that Valladares followed Torres with a concealed loaded revolver with the intent to provoke an argument with him and intended to provoke Torres.

Over defense objection, the court instructed the jury that: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force."

CALCRIM No. 3472. The CCA overlooked that a verbal confrontation does not make the person the "initial aggressor." CALCRIM No. 3472 applies to someone who starts a physical attack and not someone who starts a verbal argument. *People v. Hecker,* 109 Cal. 451, 463 (1895).

No evidence justified the issuance of CALCRIM 3472 because Valladares intended only to talk to Torres, not to fight or kill him. Torres physically assaulted Valladares by knocking Valladares to the ground. Although Valladares responded by shooting and killing Torres, no evidence supported the notion that Valladares physically attacked Torres or initiated a physical altercation.

The RR finds that the CCA reasonably found that the trial court properly gave CALCRIM No. 3474 which allowed the jury to determine if Valladares could continue to defend himself and whether Torres was still alive and disabled after the first shot and if any danger from Torres existed. RR 21. Valladares disagrees. CALCRIM No. 3474 did not apply, because, even after Valladares shot Torres, Valladares could not presume Torres had been incapacitated. Torres could have been armed and capable of

killing Valladares by merely lifting his arm and firing. Torres, too, did not get up and walk or run away. See *People v. Tamkin,* 62 Cal. 468 (1882); *People v. Keys,* 62 Cal.App.2d 903, 916 (1944) (As victim ran away, defendant shot him in the back); *People v. DeLeon*, 10 Cal.App.4th 815, 820, 825 (1992) (Defendant fired shots as assailants turned and walked away.)

A reasonable likelihood exists that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle*, 502 U.S. at 72. The trial court improperly limited Valladares' right to self defense and violated the constitution by making a conviction of a lesser offense more onerous for Valladares and less onerous for the prosecution. See *Cool v. United States,* 409 U.S. 100, 104 (1972); *Mendez v. Knowles,* 556 F.3d 757, 768 (9th Cir. 2009).

V. THE TRIAL COURT'S FAILURE TO ISSUE A UNANIMITY INSTRUCTION DEPRIVED VALLADARES OF DUE PROCESS AND A FAIR TRIAL

Valladares fired two bullets "almost simultaneous[ly]" and seemed to occur at the same time. (6RT 987) The coroner testified both wounds were fatal; she could not determine which

shot occurred first. (6RT 987) She testified "both of them [the gunshots] caused the death. . . . It's not either/or. It's just the both of them are fatal wound [sic]." (6RT 993)

The trial court found that, if the first shot killed Torres, "the second shot was shooting into the dead body." But the trial court also found, if Torres survived the first shot, the "second shot is a killing shot and it is to make sure the guy is dead." (6RT 1055) The prosecution's "two shot" theory allowed the jury to find that, because Valladares fatally shot Torres in the eye and then shot Torres once in the chest, Valladares may not have premeditated Torres' murder when he fired the first shot, but definitely committed first degree premeditated and deliberate murder when he fired the second shot.

The prosecution never elected the act upon which the homicide rested. The evidence showed both shots killed Torres and raised a substantial possibility that both shots were simultaneously fired in self-defense. The trial court should have issued a unanimity instruction to insure the jury unanimously decided which shot killed Torres.

The RR finds that no clearly established Supreme Court

law recognizes a right to a unanimous jury. RR 24-25. The RR tries to distinguish *Ramos v. Louisiana* (Case No. 18-5924), a case that will decide if the 14th Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. RR 25 The RR overlooks that Ramos' case hinges on whether the Sixth Amendment's guarantee of a unanimous jury applies to the states. The RR also finds that *Ramos* would not apply to Valladares' case because that was not the law at the time of the state court's decision. RR 25. Valladares disagrees.

At the time of the CCA's decision, California required a unanimous verdict from all twelve jurors in a criminal trial. See Cal. Const. art. I, § 16; *People v. Engelman,* 28 Cal. 4th 436, 442 (2002). Regardless of whether 12 or 10 out of 12 jurors must agree, due process requires a minimum number of jurors agree. The unanimity requirement is constitutionally rooted in the principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, on each count charged. *People v. Jones,* 51 Cal.3d 294, 305, 321 (1990); *People v. Mickle*, 54 Cal. 3d 140, 178 (1991).

The RR also overlooks that, once state law has conferred a

right to jury unanimity, the federal Constitution demands that each juror be convinced of the defendant's guilt beyond a reasonable doubt. Otherwise, California would have amended its Constitution to provide for nine-to-three verdicts in criminal cases. See, e.g., *Johnson v. Louisiana*, 406 U.S. 359 (1972). If California did so, the federal Constitution would require that at least nine of the jurors must be convinced of guilt beyond a reasonable doubt. See *id.* at 362–363.

California has chosen, instead, to demand 12-0 verdicts in criminal cases. The federal Constitution concomitantly requires that all 12 jurors voting to convict must be convinced that the defendant is guilty of the charged crime beyond a reasonable doubt. Otherwise, the reasonable doubt requirement would become meaningless.

The RR finds that no unanimity instruction was required because the CCA reasonably found that Valladares fired the two gunshots in rapid succession in a single course of conduct. RR 26. Valladares disagrees because two distinct acts occurred and the prosecutor theorized that, because Valladares fatally shot Torres in the eye and then shot Torres once in the chest, Valladares may

not have premeditated Torres' murder when he fired the first shot, but definitely committed first degree premeditated and deliberate murder when he fired the second shot. The trial court should have issued a unanimity instruction to insure the jury unanimously decided which shot or shots killed Torres.

VI. THE TRIAL COURT'S REFUSAL TO ALLOW THE JURY TO TEST FIRE THE GUN DEPRIVED VALLADARES OF DUE PROCESS AND A FAIR TRIAL

During deliberations, the jury asked to ". . . dry-fire the pistol to feel actual trigger pressure?, . . . " (1CT 68; 2CT 467; 7RT 1205) Over defense objection, the trial court allowed the jury to manipulate the gun, but not to dry fire it. (7RT 1205) Also, the trial court instructed the jury not to ". . . conduct any tests or experiments.' You may handle the firearm but you may not dry-fire it." (1CT 69; 2CT 467)

The RR finds the claim procedurally barred because trial counsel objected to allowing the jury to test fire the gun. But the RR agrees to address Valladares' claim. RR 28. The RR finds no federal question exists because no established Supreme Court precedent exists that allows a jury to conduct experiments during

deliberations. RR 28. The RR further finds that, because no Supreme Court precedent exists, the state court's adjudication of the issue cannot be contrary to, or an unreasonable application of, clearly established federal law. RR 29. The RR also finds any error was harmless because Valladares shot Torres in the face and then shot Torres again. RR29.

Valladares disagrees. The jury questioned the evidence and, under the Sixth Amendment, Valladares had the right to be tried by impartial jurors, see, e.g., *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961), and to have those jurors decide his case solely on the evidence before them, see, e.g., *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982). See also *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S. Ct. 546, 550, 13 L. Ed. 2d 424 (1965)(". . . [T]rial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

Federal courts have found similar jury experiments did not

constitute misconduct or inject extrinsic evidence into the deliberations. See, e.g., *United States v. George,* 56 F.3d 1078, 1084 (9th Cir. 1995) (holding on direct appeal that no "new evidence" resulted from jurors' use of magnifying glass to examine fingerprint cards and gun) *United States v. Brewer*, 783 F.2d 841, 843 (9th Cir. 1986) (upholding on direct appeal jury's use of magnifying glass to examine photographic evidence and finding it was not "extrinsic evidence" because no one asserted the jurors understood the magnifying glass itself to have any bearing on the case).

The failure to allow the jury to test fire the gun deprived Valladares of his constitutional right to due process, a fair trial and his right to have the jury decide his case.

VII. THE CUMULATIVE EFFECT OF THE ERRORS RENDERED VALLADARES' TRIAL UNFAIR

Contrary to RR's finding that no cumulative error occurred and the individual errors did not mandate relief, "[a]lthough no single alleged error may warrant . . . relief, the cumulative effect of errors . . . deprive[d] . . . [Valladares] of the due process right to a fair trial." *Karis v. Calderon*, 283 F.3d 1117,1132 (9thCir. 2002).

CONCLUSION

A certificate of appealability should have been issued because "(1) ' . . . jurists of reason would find it debatable whether the district court was correct in its procedural ruling'; and (2) ' . . . jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.'" *Morris v. Woodford,* 229 F.3d at 780.

A COA should also should have been issued under 28 U.S. C. § 2253 because ". . . reasonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 and n. 4 (1983).)

Certiorari should be granted.

DATED: July 15, 2021

Respectfully submitted,
FAY ARFA, A LAW CORPORATION
/s Fay Arfa

_____
Fay Arfa, Attorney for Petitioner

APPENDIX

FILED

APR 21 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEOBARDO VALLADARES, Petitioner-Appellant, v. CRAIG KOENIG, Acting Warden, Respondent-Appellee.	No. 20-55095 D.C. No. 8:19-cv-00487-JLS-JDE Central District of California, Santa Ana ORDER

Before: GRABER and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

LEOBARDO VALLADARES,
Petitioner,
v.
CRAIG KOENIG, Warden,
Respondent.

Case No. 8:19-cv-00487-JLS (JDE)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

Dated: January 19, 2020

JOSEPHINE L. STATON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

LEOBARDO VALLADARES, Petitioner, v. CRAIG KOENIG, Warden, Respondent.	Case No. 8:19-cv-00487-JLS (JDE) ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records and files herein, including the Petition (Dkt. 1), the Answer to the Petition filed by Respondent (Dkt. 13), the Traverse filed by Petitioner (Dkt. 18), the Report and Recommendation (Dkt. 22, "R&R") of the United States Magistrate Judge, and the Objection to the R&R filed by Petitioner (Dkt. 23).

Having engaged in a de novo review of those portions of the R&R to which objections have been made, the Court concurs with and accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that:

1. Petitioner's request for an evidentiary hearing is denied; and

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2. Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: January 19, 2020

JOSEPHINE L. STATON
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

LEOBARDO VALLADARES, Petitioner, v. CRAIG KOENIG, Warden, Respondent.	No. 8:19-cv-00487-JLS-JDE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.
PROCEEDINGS

On March 12, 2019, Petitioner Leobardo Valladares ("Petitioner"), through counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition" or "Pet."), together with a supporting memorandum ("Pet. Mem."). Dkt. 1-2. On August 26, 2019, Respondent filed an Answer

and supporting memorandum ("Ans. Mem."). Dkt. 13. Petitioner filed a Traverse on October 9, 2019. Dkt. 18 ("Trav.").

For the reasons discussed hereafter, the Court recommends that the Petition be denied and the action be dismissed with prejudice.

II.

PROCEDURAL HISTORY

On August 4, 2015, an Orange County Superior Court jury found Petitioner guilty of first degree murder. The jury also found true the firearm enhancement allegations. 3 Clerk's Transcript on Appeal ("CT") 476-77. On September 25, 2015, the trial court sentenced Petitioner to fifty years to life in state prison. 3 CT 530-31.

Petitioner appealed his conviction and sentence to the California Court of Appeal. Respondent's Notice of Lodgment ("Lodgment") 3. On August 31, 2017, the California Court of Appeal affirmed the judgment. Lodgment 5. A Petition for Review was denied on January 16, 2019. Pet. at 13-79, 97 (CM/ECF pagination).

Petitioner also sought to collaterally attack his conviction by filing a habeas petition in the California Court of Appeal. Lodgment 7. That petition was denied on August 31, 2017. Pet. at 135. Petitioner then filed a habeas petition in the California Supreme Court, which was denied on December 13, 2017. Id. at 136; Lodgment 6.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The underlying facts are taken from the California Court of Appeal's opinion. Petitioner does not contest the appellate court's summary of the facts and has not attempted to overcome the presumption of correctness accorded to it. See Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (explaining that

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state court's factual findings are presumed correct unless petitioner "rebuts that presumption with clear and convincing evidence").

> On the evening of September 14, 2013, Maria Huerta arranged to meet her friend [Petitioner] at a Stanton bar where they met weekly to drink and listen to music. [Petitioner], a regular patron of the bar, was friendly and respected by the waitresses and other staff.
>
> When Huerta arrived, [Petitioner] stood in front of the bar talking to friends. After about 30 minutes, Huerta and [Petitioner] walked inside. They each consumed six beers over the next two hours. Huerta did not feel intoxicated or "buzzed," and [Petitioner] did not appear intoxicated.
>
> According to Huerta, around the 2:00 a.m. closing time, a waitress who knew [Petitioner] complained to him that Francisco Torres was being rude and disrespectful to her. The waitress, Azucena Mendoza, testified she knew [Petitioner] as a regular of the bar. At some point during the evening, she was walking and holding beer bottles when Torres, who had been sitting at the bar, got up, grabbed her elbow or bicep, and asked her to bring him a beer. When he pulled on her arm, she thought he was going to fall. He also wanted her to sit and have a drink with him. Mendoza declined to get Torres another beer because he was drunk. He insulted her, called her names, and said she was a "whore." A security guard intervened and Mendoza walked over to [Petitioner's] table to calm down. She told [Petitioner], who did not appear intoxicated, what happened, pointed Torres out and described how Torres had frightened and insulted her.

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A few minutes later, Huerta, [Petitioner], Mendoza and another waitress exited the bar, where they spoke for about a minute. At some point, [Petitioner] said he was going to talk to Torres about disrespecting Mendoza. Mendoza, who returned to the bar, may have told him not to do it, and not to get involved. Huerta and [Petitioner] remained outside chatting with others who emerged, and smoking cigarettes.

Huerta testified when Torres exited the bar, [Petitioner] told Huerta, "wait for me here. I'm going to go talk to him." [Petitioner] did not seem agitated. Torres walked out of the bar alone and down the sidewalk in front of an adjacent laundromat. [Petitioner] followed Torres.

When [Petitioner] caught up to Torres the men began arguing. Torres shoved [Petitioner] against a glass window and [Petitioner] fell to the ground. [Petitioner] got up after Torres shoved him, and attempted to shove Torres back, but Torres moved out of the way. Torres approached [Petitioner] in a fighting or defensive stance. [Petitioner] then pulled out a gun from his belt area, pointed it at Torres's face, and fired from about 12 inches away. Torres fell down lying face up. [Petitioner] shot Torres in the chest, put the gun in his waistband, and took off running.

Huerta testified she heard only one shot, but told a police officer a day after the incident she thought she heard two shots. She saw [Petitioner's] hand shake or "pull back" twice. The second time was within a split second of the first; there was no "pause in between seeing his hand shake the first time and the second time." Huerta described the gun as a "gold, brown" revolver.

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Surveillance video showed [Petitioner] and Huerta standing by the door around 1:50 a.m., chatting, smoking, and interacting with various people who emerged from the bar. [Petitioner] moved over to a planter area and continued to smoke and conversed with various men. At about 1:54 a.m., [Petitioner] walked over to the bar door as Torres emerged. [Petitioner] followed Torres as he walked north along the sidewalk abutting the bar and other businesses in the strip mall. The men conversed or argued for about 20 seconds, during which [Petitioner] gestured back toward the bar. Suddenly, Torres punched or shoved [Petitioner], who stumbled backward and out of the frame. Torres approached [Petitioner] with his hands raised in a fighting position. [Petitioner] regained his footing and the men threw a few punches at each other as [Petitioner] danced around. Although the video does not clearly show this part of the incident, [Petitioner] removed his gun and shot Torres, who fell on his back with his head hanging off the curb. [Petitioner] walked quickly away after the shooting, followed by Huerta.

The evidence established [Petitioner] fired two rounds, one striking Torres in the left eye, and another striking him in the middle right side of the chest. The injury to the eye had stippling, or unburned gunpowder, around the entry point, suggesting the gun had been fired at close range. Both wounds were fatal, and Torres bled to death. Less than nine seconds had elapsed since Torres punched or shoved [Petitioner]. Investigators found no weapons on or around Torres's body, and Torres did not have cuts or bruises on his hands. Torres's blood alcohol content registered at 0.20 percent.

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> Samuel Carcamo, who knew [Petitioner] from the bar, testified [Petitioner] pulled out the gun, pointed it at Torres's forehead, and fired. Torres went down. [Petitioner] started to walk away, but then "took a step back, and . . . shot [Torres] again," this time in the stomach.
>
> Investigators found [Petitioner's] broken cell phone on the ground near Torres's body. Four days after the shooting, deputies arrested [Petitioner] at a relative's home. Interviewed at the sheriff's department, [Petitioner] denied having a gun or shooting Torres, even after investigators showed him surveillance video and told him witnesses identified him as the shooter. He explained he walked toward some people near the video store when he saw people arguing. A man he did not know said "what" to him, and he replied, "what's up?" The man struck him, causing him to hit the window and fall down, dropping his cell phone. He denied seeing the person previously in the bar. "Somebody fired," a gun, but he did not know who, and he saw someone "laying there." He walked to a friend's home because he did not want problems with the police, as he previously had been deported. [Petitioner] claimed he had six beers before he arrived at the bar, two more at the bar, and was "a little drunk."

Lodgment 5 at 2-5.

IV.

PETITIONER'S CLAIMS

1. The prosecution failed to prove beyond a reasonable doubt that Petitioner committed first degree murder. Pet. at 5.

2. The trial court deprived Petitioner of due process and a fair trial by instructing the jury with CALCRIM Nos. 3472 and 3474. Pet. at 5-6.

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3. The trial court's failure to issue a unanimity instruction deprived Petitioner of due process and a fair trial. Pet. at 6.

4. The trial court's refusal to allow the jury to test fire the gun deprived Petitioner of due process and a fair trial. Pet. at 6.

5. The individual and cumulative effect of the foregoing errors rendered Petitioner's trial fundamentally unfair. Pet. at 6.

6. Trial counsel rendered ineffective assistance by failing to investigate and present a trauma expert. Pet. at 6.1.

V.

STANDARD OF REVIEW

The Petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (the "AEDPA") under which federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000).

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if it either applies a rule that

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contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by [Section] 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" Packer, 537 U.S. at 11 (quoting 28 U.S.C. § 2254(d)). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 24-27. An "unreasonable application" is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-11; see also Visciotti, 537 U.S. at 25; Bell v. Cone, 535 U.S. 685, 694 (2002). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, as the Supreme Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011), review

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of state court decisions under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits.

Here, Petitioner raised claims similar to those raised in Grounds One through Five in the California Court of Appeal on direct appeal. The court of appeal rejected these claims in a reasoned decision on August 31, 2017. Lodgment 5. Thereafter, the California Supreme Court denied Petitioner's Petition for Review without comment or citation to authority. Pet. at 97. In such circumstances, the Court will "look through" the unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment, in this case, the court of appeal's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

As to the remaining claim, Petitioner raised this ineffective assistance of counsel claim in his state habeas petitions. Both the California Court of Appeal and the California Supreme Court denied his habeas petitions without comment or citation to authority. See Pet. at 135-36. The Court presumes the summary denials were merits determinations "in the absence of any indication or state-law procedural principles to the contrary." Richter, 562 U.S. at 99. The parties have not presented any evidence rebutting this presumption. As such, the AEDPA standard of review applies, id. at 98, and the Court must conduct an "independent review of the record and ascertain whether the state court's decision was objectively unreasonable." Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (internal quotation marks and citation omitted); see also Murray v. Schriro, 745 F.3d 984, 996 (9th Cir. 2014). "[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court's decision;

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and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Pinholster, 563 U.S. at 188 (last alteration added) (quoting Richter, 562 U.S. at 102). In reviewing the state court decisions, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

A. Petitioner is Not Entitled to Habeas Relief on His Insufficiency of the Evidence Claim

In Ground One, Petitioner contends that the prosecutor failed to prove beyond a reasonable doubt that he committed first degree murder. Pet. at 5. He maintains that he never deliberately and with premeditation killed Francisco Torres ("Torres"). Petitioner asserts the killing resulted from a spontaneous fistfight; it resulted "from imperfect self-defense, or a sudden quarrel, or heat of passion that Torres instigated when he hit, shoved or punched" Petitioner. Pet. Mem. at 11, 14-16. While Petitioner concedes he had a gun, he "likely carried the gun for self-protection in a high crime area." Id. at 14.

1. The California Court of Appeal Decision

The California Court of Appeal rejected Petitioner's insufficiency of the evidence claim on direct appeal, concluding that "the evidence as a whole support[ed] the jury's verdict." Lodgment 5 at 5. The court of appeal explained (id. at 8-9):

> Here, sufficient evidence supports [Petitioner's] first degree murder conviction. The jury reasonably could conclude [Petitioner's] motive in killing Torres was retribution for his earlier misbehavior toward the waitress, who was [Petitioner's] friend. The record also supports an inference [Petitioner] acted to uphold

his reputation in the bar as a respected person who could solve problems and vindicate slights. When Torres struck [Petitioner] and knocked him to the ground outside the bar, the jury reasonably could conclude [Petitioner] was motivated to shoot Torres to address or remedy the damage to his reputation if he were to lose this fight. Consequently, he shot Torres in the head and as the prosecutor argued, "turned back to finish the job" by shooting Torres in the chest to avenge Torres's disrespectful and rude conduct to him and to those in the bar.

The record also contains planning evidence. [Petitioner] waited outside the bar with a loaded revolver concealed in his waistband and followed Torres to confront him about his conduct inside the bar. He would have known this might provoke an argument with the intoxicated Torres, and lead to a violent confrontation. But he prepared himself to respond with deadly force. As the prosecutor argued, [Petitioner] "chased [Torres] down knowing he had a revolver in his waistband." The jury could conclude [Petitioner] planned a murder by concealing the gun and intending to use it if he was losing the fight.

The evidence also showed the manner of the killing was particular and exacting, which supports a finding [Petitioner] had planned the killing. As noted, [Petitioner] fired once into Torres's left eye, and then into the victim's chest as he lay on the ground. The jury reasonably could conclude [Petitioner] carried out the killing coolly and steadily, with cold, calculated judgment akin to an execution-style murder. (See People v. Hawkins (1995) 10 Cal.4th 920, 956-957 [evidence showed victim kneeling or crouching when the defendant fired two shots to the victim's head

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> from a distance of three to 12 inches], overruled on other grounds in People v. Lasko (2000) 23 Cal.th 101, 110.) The exacting nature of the killing supports the jury's finding [Petitioner] considered the consequences of his actions either before he confronted Torres or during the argument. We therefore reject [Petitioner's] challenge to the sufficiency of the evidence for first degree murder.

2. Applicable Legal Authority and Analysis

The California standard in reviewing a sufficiency of the evidence claim is identical to the federal standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). See People v. Johnson, 26 Cal. 3d 557, 576 (1980). The question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Parker v. Matthews, 567 U.S. 37, 43 (2012) (per curiam). The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see also Cavazos v. Smith, 565 U.S. 1, 7 (2011) (per curiam) (Jackson "instructs that a reviewing court 'faced with a record of historical facts that support conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" (quoting Jackson, 443 U.S. at 326)). Finally, "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson, 443 U.S. at 324 n.16; Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004) (en banc).

Under California law, first degree murder is the unlawful killing of another human being with malice aforethought, premeditation, and

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deliberation. See People v. Hernandez, 183 Cal. App. 4th 1327, 1332 (2010) (citing People v. Chun, 45 Cal. 4th 1172, 1181 (2009)). "Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life)." Hernandez, 183 Cal. App. 4th at 1332. Murder is deliberate and premeditated only if the perpetrator acted "as a result of careful thought and weighing of considerations; as a Deliberate judgment or plan; carried on coolly and steadily, [especially] according to a Preconceived design." See People v. Anderson, 70 Cal. 2d 15, 26 (1968) (alteration in original) (citation omitted). "In this context, '"premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."'" People v. Jennings, 50 Cal. 4th 616, 645 (2010) (citation omitted). "The process of premeditation and deliberation does not require any extended period of time" and can take place quickly. See People v. Koontz, 27 Cal. 4th 1041, 1080 (2003); People v. Perez, 2 Cal. 4th 1117, 1127 (1992). California has identified three categories of evidence relevant in determining the sufficiency of the evidence to support a finding of deliberation and premeditation: (1) the defendant's planning activity prior to the homicide; (2) the motive to kill, as gleaned from the prior relationship or conduct with the victim; and (3) the manner of the killing, from which it might be inferred the defendant had a preconceived design to kill. See Anderson, 70 Cal. 2d at 26-27; see also People v. Mendoza, 52 Cal. 4th 1056, 1069 (2011); People v. Wharton, 53 Cal. 3d 522, 546-47 (1991) (as modified).

Viewing the evidence in the light most favorable to the prosecution, the Court concludes that a rational trier of fact could have found beyond a reasonable doubt that Petitioner committed first degree murder. Each of the Anderson factors supports the jury's verdict. First, with respect to planning activity, the evidence showed that Petitioner waited outside the bar for Torres

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to confront him regarding his disrespect for women. 2 Reporter's Transcript on Appeal ("RT") 225-26, 229-30. As the court of appeal noted, Petitioner "would have known this might provoke an argument with the intoxicated Torres, and lead to a violent confrontation." Lodgment 5 at 9; 6 RT 1006, 1009. He nevertheless approached Torres armed with a concealed loaded gun. Based on this evidence, the appellate court reasonably concluded that the jury could conclude that Petitioner "planned a murder by concealing the gun and intending to use it if he was losing the fight." Lodgment 5 at 9.

The evidence also showed motive. Petitioner was a regular at the Oasis Bar, where he was well-known and respected. 2 RT 187, 197-99, 300, 317. After Torres disrespected one of the waitresses, Azucena Mendoza ("Mendoza"), who Petitioner was friendly with, by calling her names and grabbing her arm, Mendoza reported the incident to Petitioner. 2 RT 222-26, 303-04; 3 RT 398, 400-01, 406, 429. Mendoza testified that she described to Petitioner how Torres insulted her and that she was frightened. 3 RT 406-08. Mendoza pointed Torres out and Petitioner told Mendoza that he would talk to Torres outside about why he was disrespecting women. 2 RT 225; 3 RT 408-10. From this evidence, the jury could conclude that Petitioner's motive in killing Torres was retribution for his earlier behavior towards Mendoza, and to uphold his reputation in the bar as a respected patron who could resolve problems. The jury also could infer that Petitioner was further motivated to protect his reputation and avenge Torres's disrespectful conduct after Torres responded to Petitioner's confrontation outside the bar by pushing him, resulting in Petitioner falling on the ground. See 2 RT 237-40.

Finally, the manner of the killing – shooting Torres once in the face, and then shooting him again in the chest after he was already on the ground – further supports a finding of deliberation and premeditation. See 2 RT 240, 358-60, 364-65; 3 RT 520; 5 RT 868; 6 RT 967-68. The jury could have

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reasonably concluded that the killing was "akin to an execution-style murder," carried out with calculated judgment. Lodgment 5 at 9.

Petitioner's explanation for the shooting does not alter this conclusion. As noted, a reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters, 45 F.3d at 1358; see also Smith, 565 U.S. at 7.

Based on the foregoing, the state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, the Jackson standard. Petitioner is not entitled to habeas relief on his insufficiency of the evidence claim.

B. Petitioner is Not Entitled to Habeas Relief on His Instructional Error Claims

Petitioner asserts multiple claims of instructional error. In Ground Two, Petitioner contends that the trial court violated his rights to due process and a fair trial by instructing the jury with CALCRIM Nos. 3472 and 3474. Pet. at 5. In Ground Three, Petitioner contends that the failure to issue a unanimity instruction deprived him of due process and a fair trial. Id. at 6.

Challenges to state jury instructions are generally questions of state law and thus, are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). To merit habeas relief based on an instructional error, a petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." See id. at 72 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 191 (2009); Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Instructional errors must be considered in the context of the instructions as a whole and the trial record. McGuire, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

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"Where the alleged error is the failure to give an instruction the burden on petitioner is 'especially heavy,'" Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) (quoting Kibbe, 431 U.S. at 155), because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Kibbe, 431 U.S. at 155. Habeas relief is warranted only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Hedgpeth v. Pulido, 555 U.S. 57, 58, 61-62 (2008) (per curiam) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)); see also Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006) (as amended).

1. CALCRIM Nos. 3472 and 3474

Over the defense's objection, the trial court instructed the jury in accordance with CALCRIM Nos. 3472 and 3474. The trial court instructed that "[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." 2 CT 457 (CALCRIM No. 3472). The trial court further instructed, "[t]he right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker no longer appears capable of inflicting any injury, then the right to use force ends." 2 CT 458 (CALCRIM No. 3474).

Petitioner maintains that the evidence failed to support either instruction. As to CALCRIM No. 3472, Petitioner contends that he never provoked a fight or quarrel with the intent to create an excuse to use force. Pet. Mem. at 17. According to Petitioner, CALCRIM No. 3472 only applies to "someone who starts a physical attack and not someone who starts a verbal argument." Id. at 19. Petitioner argues that the evidence showed that he went to talk to Torres, and Torres responded by physically attacking him, thereby putting Petitioner "in reasonable fear of further unlawful injury" and giving Petitioner "the legal right to strike back in self-defense." Id. at 22. Petitioner argues that the prosecutor compounded the trial court's error by using

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CALCRIM No. 3472 to argue Petitioner could not claim self-defense because he instigated the fistfight. Id. at 23.

As to CALCRIM No. 3474, Petitioner argues that the evidence failed to justify this instruction because Torres may not have been incapacitated after the first shot, and therefore, the danger from Torres never dissipated. Pet. Mem. at 17, 25, 27-29.

i. The California Court of Appeal Decision

The California Court of Appeal rejected this instructional error claim on direct appeal, concluding that the trial court properly instructed the jury. Lodgment 5 at 9. The appellate court explained (id. at 10-11):

> We discern no error. The jury instructions at issue were correct statements of the law, and substantial evidence supported giving them. (People v. Breverman (1998) 19 Cal.4th 142, 154 [the trial court must instruct sua sponte on the general principles of law relevant to the issues raised by the evidence].) [Petitioner] followed Torres with a concealed loaded revolver and the evidence supported the inference he did so to provoke an argument with him. If the jury found he contrived a verbal argument (a "quarrel") with the intent to provoke Torres to use force, so that he could then shoot him, the jury properly could find he did not have the right to self-defense. (People v. Hecker (1895) 109 Cal. 451, 462 [self-defense is not available where the defendant seeks a quarrel "with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing"]; cf. People v. Ramirez (2015) 233 Cal.App.4th 940, 943 (Ramirez) [person who contrives to start a fistfight or provoke a nondeadly quarrel does not forfeit his right to live and may defend himself when his opponent escalates the conflict to deadly force].)

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Here, unlike in Ramirez, where the defendant testified he saw the victim draw a gun, no evidence suggested Torres resorted to lethal force. Consequently, the trial court had no sua sponte duty to modify the instruction accordingly. (Bench Note to CALCRIM No. 3472 (2017 ed.) p. 987 ["This instruction may require modification in the rare case in which a defendant intends to provoke only non-deadly confrontation and the victim responds with deadly force"], [emphasis] added.) When the victim does not respond, or appear to respond, with unjustified deadly force, CALCRIM No. 3472 accurately states the law and requires no modification. (People v. Eulian (2016) 247 Cal.App.4th 1324, 1334.) If [Petitioner] desired further clarifying or pinpoint instructions, it was his duty to request them. (People v. Hart (1999) 20 Cal.4th 546, 622.)

Assuming the jury found [Petitioner] initially acted in self-defense, CALCRIM No. 3474 allowed the jury to determine whether [Petitioner] could continue to defend himself because Torres still posed a deadly threat to him. As the trial court noted, the jury was entitled to determine whether Torres was still alive and "disabled" after the first shot, and whether any danger from Torres no longer existed. Finally, the instructions did not negate a self-defense theory. The court instructed on justifiable homicide: self-defense (CALCRIM No. 505), provocation: effect on degree of murder (CALCRIM No. 522); voluntary manslaughter: heat of passion—lesser included offense (CALCRIM No. 570), and voluntary manslaughter: imperfect self-defense—lesser included offense (CALCRIM No. 571). Nothing in CALCRIM Nos. 3472 and 3474 precluded the jury from finding [Petitioner] had an honest but

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> unreasonable belief in the need for self-defense. Nor did the instructions prevent the jury from finding [Petitioner] acted with adequate provocation or returning a voluntary manslaughter verdict.

ii. Analysis

Here, as explained, Petitioner contends that the evidence did not support the use of CALCRIM Nos. 3472 and 3474. However, "[g]iving an instruction which is not supported by the evidence is not a due process violation." Steele v. Holland, 2017 WL 2021364, at *8 (N.D. Cal. May 12, 2017) (alteration in original) (citation omitted) (rejecting argument that instructing jury with CALCRIM No. 3472 despite lack of factual support impaired petitioner's right to present a complete defense); see also Foster v. Sexton, 2019 WL 3766555, at *9 (C.D. Cal. Aug. 9, 2019) (finding factual challenge to CALCRIM No. 3472 did not state a cognizable federal claim); Martinez v. Hollond, 2015 WL 10044281, at *18 (C.D. Cal. Mar. 30, 3015) (rejecting claim that CALCRIM No. 3472 violated the petitioner's constitutional rights to present a complete defense, to due process, and to a fair trial because the instruction was not supported by the evidence), report and recommendation accepted by 2016 WL 552679 (C.D. Cal. Feb. 9, 2016). No clearly established Supreme Court precedent "constitutionally prohibits a trial court from instructing a jury with a factually inapplicable but accurate statement of state law." Fernandez v. Montgomery, 182 F. Supp. 3d 991, 1011 (N.D. Cal. 2016); see also Foster, 2019 WL 3766555, at *9; Prock v. Sherman, 2017 WL 4480738, at *13 (C.D. Cal. Aug. 21, 2017), report and recommendation accepted by 2017 WL 4480083 (C.D. Cal. Oct. 5, 2017). Rather, the Supreme Court has found that due process is not violated when jurors are instructed on a legal theory that lacks evidentiary support because "jurors are well equipped to analyze the evidence." Griffin v. United States, 502 U.S. 46, 59-60 (1991). Absent clearly established federal law, the Court cannot conclude that the state court's

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rejection of Petitioner's claim was either contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. See Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) (holding "it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.").

Additionally, the Court concurs with the California Court of Appeal that substantial evidence supported giving these instructions. As previously noted, the evidence showed that Petitioner waited outside for Torres with a concealed loaded gun to confront him regarding his treatment of Mendoza. They argued, Torres pushed Petitioner, and he fell to the ground. Petitioner got up, tried to push Torres back, then pulled out a gun, and shot Torres. See 2 RT 225, 229-30, 236-42, 312, 355-60. As the court of appeal concluded, this evidence supported the inference that Petitioner provoked a verbal argument, or "quarrel," with the intent to provoke Torres to use force, so that he could then shoot him. The evidence further showed that Torres did not have any weapons (see 2 RT 295; 6 RT 9005-06), and Petitioner shot him a second time after he was already on the ground. 2 RT 360, 364-65; 6 RT 961. After Petitioner shot Torres in the face, causing Torres to fall to the ground, Petitioner started walking away, but then stepped back and shot Torres a second time while Torres was still on the ground. 2 RT 359-60. Petitioner's actions provided sufficient evidence to warrant instructing the jury with CALCRIM Nos. 3472 and 3474. To the extent Petitioner contends that the appellate court erred in concluding that a "verbal confrontation" may qualify a person as the initial

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aggressor under CALCRIM No. 3472, the state court's finding on this issue is binding on federal habeas review. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); Mullaney v. Wilbur, 421 U.S. 684, 691 & n. 11 (1975) ("state courts are the ultimate expositors of state law," and a federal habeas court is bound by the state's interpretation unless "it appears to be an 'obvious subterfuge to evade consideration of a federal issue'" (citation omitted)).

Finally, CALCRIM Nos. 3472 and 3474 must be viewed in the context of the instructions as a whole. McGuire, 502 U.S. at 72. As the court of appeal correctly concluded, the instructions at issue did not negate a self-defense theory, or preclude the jury from finding Petitioner acted with adequate provocation or was guilty of a lesser offense. As the appellate court explained, the trial court instructed the jury regarding self-defense, provocation, and voluntary manslaughter. 2 CT 439-40, 445-49. Consistent with these instructions, the prosecutor acknowledged the availability of self-defense, provocation, and lesser included offenses, but argued that the evidence supported finding Petitioner guilty of first degree murder. See 7 RT 1082-83, 1109, 1113-1114, 1121-30.

Accordingly, the state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief on this instructional error claim.

2. Unanimity Instruction

Petitioner also contends that the trial court's failure to issue a unanimity instruction deprived him of due process and a fair trial. Pet. at 6. Petitioner

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maintains that although the coroner testified that the two gunshots were almost simultaneous, the prosecutor argued that the single murder count could have been committed different ways. According to Petitioner, the prosecution's "two shot" theory "allowed the jury to find that because [Petitioner] fatally shot Torres in the eye and then shot Torres once in the chest, [Petitioner] may not have premeditated Torres' murder when he fired the first shot, but definitely committed first degree premeditated and deliberate murder when he fired the second shot." Pet. Mem. at 32-33. Petitioner argues that the trial court "should have issued a unanimity instruction to insure the jury unanimously decided which shot killed Torres." Id. at 33.

i. The California Court of Appeal Decision

The California Court of Appeal rejected Petitioner's corresponding claim on direct appeal, reasoning as follows (Lodgment 5 at 12-13):

> "Where the accusatory pleading charges a single criminal offense and the evidence shows more than one such unlawful act [which may have constituted the offense] was committed, [then] either the prosecution must elect the specific act relied upon to prove the charge or the jury must be instructed . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (People v. Martinez (1988) 197 Cal.App.3d 767, 772; People v. Diedrich (1982) 31 Cal.3d 263, 281 [purpose of unanimity instruction is to require agreement among the jurors as to the act or acts which would support a conviction for the charged offense]; People v. Deletto (1983) 147 Cal.App.3d 458, 471-472 [possibility of disagreement exists where the defendant is accused of a number of unrelated incidents leaving the jurors free to believe different parts of the testimony and yet convict the defendant].) The trial court must

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give a unanimity instruction sua sponte where the facts require it. (People v. Davis (2005) 36 Cal.4th 510, 561.)

The "'continuous conduct exception'" is a limited exception to the unanimity requirement. "[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' [Citations.]" (People v. Dieguez (2001) 89 Cal.App.4th 266, 275.) In other words, where there is no evidence from which the jury could have found the defendant guilty of one act, but not the other, such as where different defenses are asserted as to each, there is no danger that different jurors would find the defendant guilty of different acts. (People v. Riel (2000) 22 Cal.4th 1153, 1199 (Riel).)

Here, there is no basis to distinguish between [Petitioner's] two gunshots. [Petitioner's] acts in firing two successive shots were substantially identical in nature. Under these circumstances, there simply is no danger that different jurors would find [Petitioner] guilty of different acts. "'[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.'" (People v. Beardslee (1991) 53 Cal.3d 68, 93.)

The jury rejected the only defense (self-defense) offered. (See People v. Stankewitz (1990) 51 Cal.3d 72, 100 [unanimity instruction not required where defendant offers essentially same

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> defense to each act and no reasonable basis for jury to distinguish between them].) Regardless, any conceivable error was harmless. (Chapman v. California (1967) 386 U.S. 18, 24; People v. Watson (1956) 46 Cal.2d 818, 836.) The jury unanimously agreed [Petitioner] intended to kill Torres and acted with premeditation and deliberation. There was no reasonable possibility a juror would have found [Petitioner] did not premeditate and deliberate by firing the first shot but that he did so during the second shot.

ii. Analysis

The state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. First, there is no clearly established Supreme Court law recognizing a right to a unanimous jury verdict in state proceedings. See Richardson v. United States, 526 U.S. 813, 817 (1999) (federal jury does not need to unanimously decide which set of underlying facts make up a particular element of a crime); Schad v. Arizona, 501 U.S. 624, 632 (1991) (plurality opinion) ("there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict" (citation omitted)); McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) ("[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict" (internal footnote omitted)); Johnson v. Louisiana, 406 U.S. 356, 359 (1972) (recognizing that "[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict" (alterations in original) (citation omitted); Sullivan v.

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Borg, 1 F.3d 926, 927 (9th Cir. 1993) (holding that Schad was dispositive of petitioner's claim that a jury instruction allowing the jury to convict him of first degree murder without unanimity as to whether he committed felony murder or premeditated murder violated his rights to due process and equal protection). To the contrary, "a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict." Schad, 501 U.S. at 634 n.5.

In his Traverse, Petitioner notes that the Supreme Court heard oral arguments in Ramos v. Louisiana (Case No. 18-5924) on October 7, 2019 and "will decide if the 14th Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. Ramos' case hinges on whether the Sixth Amendment's guarantee of a unanimous jury applies to the states." Trav. at 16-17. The petitioner in Ramos was tried by a twelve-member jury, ten of whom found him guilty of second degree murder. Under the Louisiana Code of Criminal Procedure only ten jurors must concur to render a verdict. This case is distinguishable from the present case, where the question is not whether all jurors agreed that Petitioner was guilty of first degree murder. In any event, as explained, federal habeas courts must evaluate the state court's decision on the basis of the law that was clearly established at "the time of the state-court decision." Williams, 529 U.S. at 412; see also Greene v. Fisher, 565 U.S. 34, 38 (2011). Thus, whether the ultimate decision in Ramos may support Petitioner's claim, this was not the law at the time of the state court's decision and as such, would not apply here. See Bennet v. Terhune, 265 F. App'x 490, 492 (9th Cir. 2008); Winter v. Scribner, 2012 WL 1189482, at *28 (E.D. Cal. Apr. 9, 2012), affirmed by 577 F. App'x 651 (9th Cir. 2014).

Additionally, to the extent Petitioner contends that a unanimity instruction was required by the California Constitution (Trav. at 17), this claim is not cognizable on federal habeas review. See Wilson v. Corcoran, 562 U.S.

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1, 5 (2010) (per curiam) ("it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts"); McGuire, 502 U.S. at 71-72. Federal habeas relief is not available for errors of state law. See 28 U.S.C. § 2254(a); McGuire, 502 U.S. at 67-68. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." McGuire, 502 U.S. at 68; Smith v. Phillips, 455 U.S. 209, 221 (1982). Accordingly, Petitioner's claim alleging instructional error based on state law does not present a federal question. See McGuire, 502 U.S. at 71-72 ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); Miller v. Rickley, 2016 WL 7480265, at *3 (C.D. Cal. Nov. 22, 2016) (finding claim based on the California Constitution not cognizable), report and recommendation accepted by 2016 WL 7485672 (C.D. Cal. Dec. 29, 2016).

Moreover, the court of appeal concluded that the instruction was not required under state law under the circumstances presented in this case. Lodgment 5 at 13. This Court is bound by the California Court of Appeal's conclusion that the instruction was not required under state law, a finding that was not arbitrary or obvious subterfuge. See Bradshaw, 546 U.S. at 76; Mullaney, 421 U.S. at 691 & n.11.

Finally, even if the trial court erred in failing to give a unanimity instruction, Petitioner has failed to show that the error had "substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 637. The forensic pathologist testified that the gunshots occurred almost simultaneously and both were fatal. 6 RT 987-88, 993. As the appellate court found, "[t]here was no reasonable possibility a juror would have found [Petitioner] did not premeditate and deliberate by firing the first shot but that he did so during the second shot." Lodgment 5 at 13. The jury was instructed

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regarding the reasonable doubt standard, the prosecution's burden of proof, and that the jury must agree on the verdict. 2 CT 402, 415, 444, 451. The jury is presumed to have followed the instructions given, Weeks v. Angelone, 528 U.S. 225, 234 (2000), a presumption that Petitioner has not rebutted.

Accordingly, Petitioner is not entitled to habeas relief on this claim.

C. Petitioner is Not Entitled to Habeas Relief on His Claim that the Jurors Should Have Been Permitted to Test Fire the Gun

During deliberations, the jury asked, "Can we dry-fire the pistol to feel actual trigger pressure?" 1 CT 68; 2 CT 467; 7 RT 1204. The trial court consulted with the parties, and Petitioner objected that the jury should not be permitted to test-fire the gun or hold it, arguing that it constituted an improper experiment. 7 RT 1204, 1207. The trial court concluded that it would allow the jurors to handle the gun, but not conduct any tests or experiments. 7 RT 1207-09. The trial court responded to the jury's question as follows: "No. Per CALCRIM 201, 'Do not conduct any tests or experiments.' You may handle the firearm but you may not dry-fire it." 1 CT 69; 2 CT 467.

In Ground Four, Petitioner contends that the trial court's refusal to allow the jury to test fire the gun deprived him of due process and a fair trial. Pet. at 6. Petitioner claims the prosecution introduced the gun issue into evidence by arguing that the pressure required to fire the gun negated any self-defense. According to Petitioner, the "jury needed to dry fire the gun to decide if the ability to fire the gun negated [Petitioner's] claim of self-defense/sudden quarrel." Pet. Mem. at 40. Petitioner argues that trial counsel rendered ineffective assistance by objecting to the jury's request. Id. at 44.

1. The California Court of Appeal Decision

On direct appeal, the California Court of Appeal concluded that the trial court did not abuse its discretion in prohibiting the test and any error was harmless (Lodgment 5 at 15):

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> The trial court properly could have allowed the jury to dry fire the revolver to feel the trigger weight. The gun was admitted in evidence, and nothing suggests the weapon was in a substantially different condition at the time of trial than it was at the time the expert tested it. But the court did not abuse its discretion in prohibiting the test. Most significantly, the defense objected to the testing, presumably for tactical reasons. [Petitioner] therefore forfeited or invited any error. Finally, any conceivable error was not prejudicial because the defense did not claim [Petitioner] fired accidentally, and there was no evidence he did.

2. Analysis

Preliminarily, Respondent argues this claim is procedurally barred as Petitioner objected to allowing the jury to test fire the gun. Ans. Mem. at 19. In the interest of judicial economy, the Court will address Petitioner's claim on the merits rather than consider the procedural default issue. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

Here, Petitioner has not cited, and the Court is not aware of, any clearly established Supreme Court authority recognizing a due process violation where the jury is prohibited from conducting tests or experiments during deliberations. Rather, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986) ("Jurors have

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a duty to consider only the evidence which is presented to them in open court."). Nor can Petitioner transform a state law issue into a federal one merely by asserting a violation of due process. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1997) (as modified). It is immaterial that the Ninth Circuit may have found jurors' use of a magnifying glass did not constitute misconduct. Trav. at 20-21 (citing United States v. George, 56 F.3d 1078, 1084 (9th Cir. 1995); United States v. Brewer, 783 F.2d 841, 843 (9th Cir. 1986)). Neither case recognized a constitutional right to conduct juror experiments, and the decision of a circuit court does not create clearly established Supreme Court precedent. See Holley v. Yarborough, 568 F.3d 1091, 1097 (9th Cir. 2009) ("Circuit precedent may not serve to create established federal law on an issue the Supreme Court has not yet addressed."). In the absence of clearly established law, the state court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. See Knowles, 556 U.S. at 122; Brewer, 378 F.3d at 955.

Additionally, as the court of appeal reasonable concluded, any error was harmless. As the appellate court noted, Petitioner did not claim he fired the gun accidentally and there was no evidence that he did. Lodgment 5 at 15. Evidence showed that Petitioner pulled the gun out of his waistband and shot Torres in the face. He then started to walk away, but then took a step back and shot Torres again. 2 RT 240-41, 313, 359-60, 364-65.

The state court's decision did not conflict with the reasoning or holdings of Supreme Court precedent and did not apply harmless error review in an objectively unreasonable manner. Mitchell v. Esparza, 540 U.S. 12, 17-18 (2003) (per curiam); Inthavong v. Lamarque, 420 F.3d 1055, 1058-59 (9th Cir. 2005); see also Davis v. Ayala, 576 U.S. –, 135 S. Ct. 2187, 2198-99 (2015). Petitioner is not entitled to habeas relief on this claim.

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D. Petitioner is Not Entitled to Relief on His Cumulative Error Claim

In Ground Five, Petitioner contends that the individual and cumulative effect of the errors alleged in Grounds One through Four rendered his trial fundamentally unfair. Pet. at 6; Pet. Mem. at 44-45. On direct appeal, the California Court of Appeal rejected this claim, concluding that because it had found no error, the cumulative error doctrine did not apply. Lodgment 5 at 16.

"[T]he combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007); see also United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). Here, however, none of Petitioner's claims has merit. Thus, the collective impact of the purported errors underlying those claims could not have rendered Petitioner's trial fundamentally unfair. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."). Accordingly, the state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

E. Petitioner is Not Entitled to Habeas Relief on His Ineffective Assistance of Counsel Claim

In Ground Six, Petitioner asserts his trial counsel rendered ineffective assistance by failing to investigate and present a trauma expert. Pet. at 6.1. He argues such testimony would have proven that he acted from "an instinctual, survival reaction and did not premeditate the killing," and the jury would have found him "not guilty of murder if the jury understood [his] state of mind when Torres attacked him." Pet. Mem. at 45.

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Petitioner submits the declaration of Kevin E. Booker, Ph. D., a licensed clinical trauma psychologist. Pet. Mem., Exh. A. Dr. Booker opines that Petitioner "acted in a manner consistent with an extreme fight-flight reaction secondary to palpable, perceived fear for his life." Id. ¶ 5. Dr. Booker attests that the fight/flight syndrome "is a biologically-based phenomenon that spontaneously and automatically activates when an individual perceives palpable fear (involving a sense of terror, horror, or helplessness) and believes that he or she could be seriously injured or killed." Id. ¶ 9. He claims that after Petitioner spoke with Torres and Torres punched him, causing him to fall to the ground, Petitioner "subjectively experienced fear that led him to perceive that his life was in danger." According to Dr. Booker, Torres exacerbated Petitioner's fear when, after Petitioner stood up, Torres walked toward him to confront him. Id. ¶ 16. This "perceived fear," Dr. Booker explained, "would have led to autonomic-nervous-system activation, causing an acute survival response – 'fight' which ultimately overrode [Petitioner's] rational decision-making abilities." Id. ¶ 17. Dr. Booker attests that Petitioner "reacted instinctively to extinguish the threat" and "[o]nce the episode, and fight flight system engaged, the 'switch' was activated and could not be consciously deactivated." Id. ¶ 18.

1. Applicable Legal Authority

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90.

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Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective assistance of counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim: "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." 562 U.S. at 101. The Supreme Court further explained:

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range

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> of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 105 (internal citations omitted).

Trial counsel's failure to conduct a reasonable investigation and present mitigating evidence may constitute ineffective assistance of counsel. See Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See Strickland, 466 U.S. at 691; see also Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client."). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691; see also Cox v. Del Papa, 542 F.3d 669, 679 (9th Cir. 2008); Reynoso v. Giurbino, 462 F.3d 1099, 1114 (9th Cir. 2006). "[A] lawyer who fails adequately to investigate and introduce . . . [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." See Duncan v. Ornoski, 528 F.3d 1222, 1234 (9th Cir. 2008) (alterations in original) (quoting Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999) (as amended)); Reynoso, 462 F.3d at 1112. However, the relevant inquiry is not what could have been pursued, but whether the choices made about what to pursue and what not to pursue were reasonable. Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998).

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Complaints based upon uncalled witnesses are not favored in habeas corpus petitions "because the presentation of witness testimony is essentially strategic and thus within trial counsel's domain, and that speculations as to what these witnesses would have testified is too uncertain." Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985); see also Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999). As the Supreme Court has recognized, from the perspective of a defense attorney preparing for trial, there are "any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly [be] useful." Richter, 562 U.S. at 107. "Counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Id. Even if expert testimony on a particular topic could support a defense, a state court conclusion "that a competent attorney might elect not to use it" could still be reasonable, particularly if such evidence would "increase[] the likelihood of the prosecution producing its own evidence" on the topic, evidence which could weaken the defense. Id. at 108. As a result, the Supreme Court in Richter found that a state court did not unreasonably determine that a defense attorney's failure to call a rebuttal expert after the prosecution offered expert testimony on a topic was not ineffective assistance. Id. at 790-91.

2. Analysis

Petitioner bears the burden of proving trial counsel's strategy was deficient. Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009). "Although courts may not indulge 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions [citation], neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." Richter, 562 U.S. at 109. "[T]he presentation of

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expert testimony is not necessarily an essential ingredient of a reasonably competent defense." Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995).

Here, Petitioner has not rebutted the strong presumption that counsel's decision was sound trial strategy. Strickland, 466 U.S. at 689-90 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."); Lord, 184 F.3d at 1095; Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992) (holding that counsel was not ineffective for deciding not to call alibi witness who would have done "more harm than good"). Declining to call a witness, even an expert witness, is not in and of itself unreasonable. See Richter, 562 U.S. at 107 (explaining that "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies"); Epsom v. Hall, 330 F.3d 49, 53 (1st Cir. 2003) ("Often, a weak witness or argument is not merely useless but, worse than that, may detract from the strength of the case by distracting from stronger arguments and focusing attention on weaknesses").

Petitioner argues trial counsel provided constitutionally deficient representation by failing to call a trauma expert witness at trial, offering a brief after-the-fact opinion by Dr. Booker who concludes, among other things, that Petitioner "acted in a manner consistent with an extreme fight-flight reaction secondary to palpable, perceived fear for his life." Pet. Mem., Exh. A ¶ 5. The argument fails.

A decision not to offer an opinion such as Dr. Booker's is not unreasonable for several reasons. First, Dr. Booker's opinion is based, in part, on Petitioner's appellate counsel's "statement of facts from her opening brief." Pet. Mem., Exh. A at ¶ 4. This reliance upon counsel's version of events creates two problems: (a) an expert's reliance on counsel's version of events in forming an opinion would cast serious questions on both the basis for the

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opinion and the credibility of counsel; and (b) appellate counsel's opening appellate brief was obviously not in existence at the time of trial, making any extrapolation of how Dr. Booker would have testified at the time of trial speculative at best.

Second, Dr. Booker's opinion relies upon a materially incomplete record. For example, Dr. Booker states that "[t]he video shows [Petitioner] did not initiate the altercation. The video shows that [Petitioner] approached the decedent and spoke to him." Pet. Mem., Exh. A at ¶ 6. However, the testimony at trial demonstrated the Petitioner waited outside the location for the victim to leave in order to approach the victim regarding his treatment of Mendoza; lacking that information, Dr. Booker's characterization of the video as "show[ing Petitioner] did not initiate the altercation" does not tell the full story and does so in a way trial counsel may not have wished to undertake. Similarly, Dr. Booker recounts that Petitioner "shot the decedent twice" in "one contiguous shooting. Even though two shots were fired. The number of shots was inconsequential to the episode. Once the episode, and fight flight system engaged, the 'switch' was activated and could not consciously be deactivated." Id. at ¶¶ 7, 18. However, Dr. Booker appears not to seriously consider the trial testimony of Petitioner's friend, Samuel Carcamo, that Petitioner had started to leave after the first shot, but then stopped, stepped back toward the fallen victim, and shot him again. 2 RT 359-60. That Dr. Booker apparently did not account for these facts might not only cause a jury to question his opinion, it could cause a jury to question the credibility of the attorney calling him.

Third, offering the opinion of an expert such as Dr. Booker could have had negative consequences for Petitioner. Calling such an expert would have enabled the prosecutor to, through cross-examination, highlight again the incriminating testimony against Petitioner. Further, calling such an expert

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would certainly have enabled the prosecution to call a rebuttal expert who would have highlighted the choices Petitioner made, including the choice to, after starting to walk away, to step back and fire a second fatal shot into the prone victim, and, five days after the shooting, tell repeated false exculpatory lies to police about the shooting.

Petitioner's proffer of Dr. Booker's brief opinion, which (1) did not exist at the time of trial; (2) is based in part, appellate counsel's recitations of facts long after the trial was over; (3) does not take into account significant incriminating evidence that was before the jury; and (4) would likely have resulted in further inculpatory testimony by prosecution expert witnesses highlighting the most damaging evidence against Petitioner, does not show that trial counsel was constitutionally ineffective and does not show that the state court's rejection of such an argument was unreasonable. A reasonable attorney could have made a strategic decision not to call such a witness, choosing instead to make a similar argument about self-defense based on the actual evidence (see RT 1151-54), without all of the risks associated with offering testimony from an expert such as Dr. Brooks. See Richter, 562 U.S. at 108 ("An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense."). Petitioner has not met his burden under Strickland, considering the "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Nor has Petitioner overcome the "doubly" deferential standard on federal habeas review to show the state court's application of Strickland was unreasonable.

Further, Petitioner has not demonstrated prejudice. In light of the substantial evidence supporting the first degree murder conviction, it is not "reasonably likely" the result would have been different. Richter, 562 U.S. at 111. The state court's rejection of this claim was not "so lacking in justification

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that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103. Petitioner is not entitled to habeas relief on this claim.

F. Petitioner is Not Entitled to an Evidentiary Hearing

Petitioner also requests an evidentiary hearing. Pet. Mem. at 5. The Supreme Court has held that the AEDPA requires federal courts to review state court decisions on the basis of the record before the state court. Pinholster, 563 U.S. at 181-85. Moreover, an evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007). "It is axiomatic that when issues can be resolved with reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Here, Petitioner's claims can be resolved by reference to the state court record. Accordingly, Petitioner's request for an evidentiary hearing should be denied.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: November 25, 2019__

JOHN D. EARLY
United States Magistrate Judge

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Court of Appeal, Fourth Appellate District, Division Three - No. G052613

S244602

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

LEOBARDO VALLADARES, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEOBARDO VALLADARES, Defendant and Appellant.	G052613 (Super. Ct. No. 13WF0932) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Fay Arfa, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

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A jury convicted Leobardo Valladares of premediated and deliberate first degree murder (Pen. Code, § 187, subd. (a); all statutory citations are to the Penal Code), and found he personally discharged a firearm causing death (§ 12022.53, subd. (d)). Valladares challenges the sufficiency of the evidence to support his first degree murder conviction. He also contends the trial court erred by instructing the jury with CALCRIM Nos. 3472 and 3474, erred by failing to provide a unanimity instruction, erred by refusing to allow the jury to test fire the firearm, and the cumulative effect of the errors rendered his trial unfair. We conclude these contentions lack merit and therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of September 14, 2013, Maria Huerta arranged to meet her friend Valladares at a Stanton bar where they met weekly to drink and listen to music. Valladares, a regular patron of the bar, was friendly and respected by the waitresses and other staff.

When Huerta arrived, Valladares stood in front of the bar talking to friends. After about 30 minutes, Huerta and Valladares walked inside. They each consumed six beers over the next two hours. Huerta did not feel intoxicated or "buzzed," and Valladares did not appear intoxicated.

According to Huerta, around the 2:00 a.m. closing time, a waitress who knew Valladares complained to him that Francisco Torres was being rude and disrespectful to her. The waitress, Azucena Mendoza, testified she knew Vallardares as a regular of the bar. At some point during the evening, she was walking and holding beer bottles when Torres, who had been sitting at the bar, got up, grabbed her elbow or bicep, and asked her to bring him a beer. When he pulled on her arm, she thought he was going to fall. He also wanted her to sit and have a drink with him. Mendoza declined to get Torres another beer because he was drunk. He insulted her, called her names, and said

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she was a "whore." A security guard intervened and Mendoza walked over to Valladares's table to calm down. She told Valladares, who did not appear intoxicated, what happened, pointed Torres out and described how Torres had frightened and insulted her.

A few minutes later, Huerta, Valladares, Mendoza and another waitress exited the bar, where they spoke for about a minute. At some point, Valladares said he was going to talk to Torres about disrespecting Mendoza. Mendoza, who returned to the bar, may have told him not to do it, and not to get involved. Huerta and Valladares remained outside chatting with others who emerged, and smoking cigarettes.

Huerta testified when Torres exited the bar, Valladares told Huerta, "wait for me here. I'm going to go talk to him." Valladares did not seem agitated. Torres walked out of the bar alone and down the sidewalk in front of an adjacent laundromat. Valladares followed Torres.

When Valladares caught up to Torres the men began arguing. Torres shoved Valladares against a glass window and Valladares fell to the ground. Valladares got up after Torres shoved him, and attempted to shove Torres back, but Torres moved out of the way. Torres approached Valladares in a fighting or defensive stance. Valladares then pulled out a gun from his belt area, pointed it at Torres's face, and fired from about 12 inches away. Torres fell down lying face up. Valladares shot Torres in the chest, put the gun in his waistband, and took off running.

Huerta testified she heard only one shot, but told a police officer a day after the incident she thought she heard two shots. She saw Valladares's hand shake or "pull back" twice. The second time was within a split second of the first; there was no "pause in between seeing his hand shake the first time and the second time." Huerta described the gun as a "gold, brown" revolver.

Surveillance video showed Valladares and Huerta standing by the door around 1:50 a.m., chatting, smoking, and interacting with various people who emerged

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from the bar. Valladares moved over to a planter area and continued to smoke and conversed with various men. At about 1:54 a.m., Valladares walked over to the bar door as Torres emerged. Valladares followed Torres as he walked north along the sidewalk abutting the bar and other businesses in the strip mall. The men conversed or argued for about 20 seconds, during which Valladares gestured back toward the bar. Suddenly, Torres punched or shoved Valladares, who stumbled backward and out of the frame. Torres approached Valladares with his hands raised in a fighting position. Valladares regained his footing and the men threw a few punches at each other as Valladares danced around. Although the video does not clearly show this part of the incident, Valladares removed his gun and shot Torres, who fell on his back with his head hanging off the curb. Valladares walked quickly away after the shooting, followed by Huerta.

The evidence established Valladares fired two rounds, one striking Torres in the left eye, and another striking him in the middle right side of the chest. The injury to the eye had stippling, or unburned gunpowder, around the entry point, suggesting the gun had been fired at close range. Both wounds were fatal, and Torres bled to death. Less than nine seconds had elapsed since Torres punched or shoved Valladares. Investigators found no weapons on or around Torres's body, and Torres did not have cuts or bruises on his hands. Torres's blood alcohol content registered at 0.20 percent.

Samuel Carcamo, who knew Valladares from the bar, testified Valladares pulled out the gun, pointed it at Torres's forehead, and fired. Torres went down. Valladares started to walk away, but then "took a step back, and . . . shot [Torres] again," this time in the stomach.

Investigators found Valladares's broken cell phone on the ground near Torres's body. Four days after the shooting, deputies arrested Valladares at a relative's home. Interviewed at the sheriff's department, Valladares denied having a gun or shooting Torres, even after investigators showed him surveillance video and told him witnesses identified him as the shooter. He explained he walked toward some people

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near the video store when he saw people arguing. A man he did not know said "what" to him, and he replied, "what's up?" The man struck him, causing him to hit the window and fall down, dropping his cell phone. He denied seeing the person previously in the bar. "Somebody fired," a gun, but he did not know who, and he saw someone "laying there." He walked to a friend's home because he did not want problems with the police, as he previously had been deported. Valladares claimed he had six beers before he arrived at the bar, two more at the bar, and was "a little drunk."

Following a trial in July 2015, the jury convicted Valladares as noted above. In September 2015, the court imposed a prison sentence of 50 years to life, comprised of a term of 25 years to life for first degree murder, and a consecutive term of 25 years to life for personally discharging a firearm causing death.

II

DISCUSSION

A. *Substantial Evidence Supports the Jury's Verdict of First Degree Premeditated Deliberate Murder*

Valladares contends the judgment should be modified to reflect a conviction for second degree murder rather than first degree murder because insufficient evidence supported the jury's conclusion defendant acted with premeditation and deliberation. Because the evidence showed that Torres threw the first punch in a spontaneous fistfight, knocking Valladares to the ground, and again approached Valladares to resume his assault, Valladares contends the prosecution failed to prove he premeditated and deliberated the murder. We conclude the evidence as a whole supports the jury's verdict.

On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980)

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26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The test is whether substantial evidence supports the trier of fact's conclusion, not whether the appellate court would make the same determination. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Because an appellate court must "give due deference to the trier of fact and not retry the case ourselves," an appellant challenging the sufficiency of the evidence "bears an enormous burden." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Murder that is "willful, deliberate, and premeditated . . . is murder of the first degree. All other kinds of murders are of the second degree." (§ 189.) By dividing the offense of murder into two degrees, the Legislature attached greater moral culpability for deliberate and preconceived murders. (*People v. Bender* (1945) 27 Cal.2d 164, 181 (*Bender*) [Legislature intended to "distinguish between deliberate acts and hasty or impetuous acts"] overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Holt* (1944) 25 Cal.2d 59, 90-91.)

Premeditation "encompasses the idea that a defendant thought about or considered the act beforehand." (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) Deliberation """refers to careful weighing of considerations in forming a course of action."""" (*Ibid.*) "The word 'deliberate' is an antonym of 'Hasty, impetuous, rash, impulsive' [citation] and no act or intent can truly be said to be 'premeditated' unless it has been the subject of actual deliberation or forethought." (*People v. Thomas* (1945) 25 Cal.2d 880, 901.) To find a person guilty of deliberate premeditated murder the evidence must show the defendant's acts were the result of careful thought and weighing of considerations rather than an unconsidered or rash impulse. (*People v. Banks* (2014) 59 Cal.4th 1113, 1153, overruled on other grounds in *People v. Scott* (2015) 64 Cal.4th 363, 391, fn. 3.) The Legislature applied the "common, well-known dictionary meaning" to the words "'deliberate'" and "'premeditate.'" (*Bender, supra,* 27 Cal.2d at p. 183.)

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Accordingly, the court explained "[t]he adjective 'deliberate' means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; . . . unhurried; . . . Characterized by reflection; dispassionate; not rash.'" (*Ibid.*)

The time taken to deliberate on a plan or course of action varies among individuals. The focus, however, is on "'the extent of the reflection,'" not the time it took before deciding to act. (*People v. Solomon* (2010) 49 Cal.4th 792, 813.) "'"'"'"'"'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"'"'"'"'" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) Juries must determine whether a defendant premeditated and deliberated in "the interval between the fully formulated intent and its execution." (*Bender, supra,* at p. 182.) To prove a defendant premeditated and deliberated the consequences of his action, there must be "*substantially more reflection* than may be involved in the mere formation of a specific intent to kill." (*People v. Thomas, supra,* 25 Cal.2d at p. 900, italics added.)

As explained in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), "Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation], or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.'" (*Id.* at p. 25.)

Anderson addressed this problem by providing guidelines for the type of evidence which would sustain a finding of premeditation and deliberation, noting the

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evidence "falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.)

Here, sufficient evidence supports Valladares's first degree murder conviction. The jury reasonably could conclude Valladares's motive in killing Torres was retribution for his earlier misbehavior toward the waitress, who was Valladares's friend. The record also supports an inference Valladares acted to uphold his reputation in the bar as a respected person who could solve problems and vindicate slights. When Torres struck defendant and knocked him to the ground outside the bar, the jury reasonably could conclude Valladares was motivated to shoot Torres to address or remedy the damage to his reputation if he were to lose this fight. Consequently, he shot Torres in the head and as the prosecutor argued, "turned back to finish the job" by shooting Torres in the chest to avenge Torres's disrespectful and rude conduct to him and to those in the bar.

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The record also contains planning evidence. Valladares waited outside the bar with a loaded revolver concealed in his waistband and followed Torres to confront him about his conduct inside the bar. He would have known this might provoke an argument with the intoxicated Torres, and lead to a violent confrontation. But he prepared himself to respond with deadly force. As the prosecutor argued, Valladares "chased [Torres] down knowing he had a revolver in his waistband." The jury could conclude Valladares planned a murder by concealing the gun and intending to use it if he was losing the fight.

The evidence also showed the manner of the killing was particular and exacting, which supports a finding Valladares had planned the killing. As noted, Valladares fired once into Torres's left eye, and then into the victim's chest as he lay on the ground. The jury reasonably could conclude Valladares carried out the killing coolly and steadily, with cold, calculated judgment akin to an execution-style murder. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [evidence showed victim kneeling or crouching when the defendant fired two shots to the victim's head from a distance of three to 12 inches], overruled on other grounds in *People v. Lasko* (2000) 23 Cal.th 101, 110.) The exacting nature of the killing supports the jury's finding Valladares considered the consequences of his actions either before he confronted Torres or during the argument. We therefore reject Valladares's challenge to the sufficiency of the evidence for first degree murder.

B. *The Trial Court Properly Instructed the Jury*

Valladares argues the trial court erred and violated his right to due process by instructing with CALCRIM Nos. 3472 and 3474. CALCRIM No. 3472 provided: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." CALCRIM No. 3474 provided: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears

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to exist. When the attacker no longer appears capable of inflicting any injury, then the right to use force ends."

Valladares asserts the evidence failed to support the instructions because he did not provoke a fight or quarrel with the intent to create an excuse to use force. He also asserts CALCRIM No. 3472 applies to someone who starts a physical attack and not someone who starts a verbal argument. He further argues the evidence "failed to justify CALCRIM No. 3474 because the danger from Torres never [dissipated]. Valladares' right of self-defense continued during both shots, not just the first shot as the prosecutor argued."[1]

We discern no error. The jury instructions at issue were correct statements of the law, and substantial evidence supported giving them. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 [the trial court must instruct sua sponte on the general principles of law relevant to the issues raised by the evidence].) Valladares followed Torres with a concealed loaded revolver and the evidence supported the inference he did so to provoke an argument with him. If the jury found he contrived a verbal argument (a "quarrel") with the intent to provoke Torres to use force, so that he could then shoot him, the jury properly could find he did not have the right to self-defense. (*People v. Hecker* (1895) 109 Cal. 451, 462 [self-defense is not available where the defendant seeks a quarrel "with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing"]; cf. *People v. Ramirez* (2015) 233 Cal.App.4th 940, 943 (*Ramirez*) [person who contrives to start a fistfight or provoke a nondeadly quarrel does not forfeit his right to live and may defend himself when his opponent escalates the conflict to deadly force].)

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[1] The Attorney General notes a portion of Valladares's argument appears to relate to CALCRIM No. 3471, an instruction dealing with mutual combat that was not given.

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Here, unlike in *Ramirez*, where the defendant testified he saw the victim draw a gun, no evidence suggested Torres resorted to lethal force. Consequently, the trial court had no sua sponte duty to modify the instruction accordingly. (Bench Note to CALCRIM No. 3472 (2017 ed.) p. 987 ["This instruction may require modification in the rare case in which a defendant intends to provoke only non-deadly confrontation *and the victim responds with deadly force*"], italics added.) When the victim does not respond, or appear to respond, with unjustified deadly force, CALCRIM No. 3472 accurately states the law and requires no modification. (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334.) If Valldares desired further clarifying or pinpoint instructions, it was his duty to request them. (*People v. Hart* (1999) 20 Cal.4th 546, 622.)

Assuming the jury found Valladares initially acted in self-defense, CALCRIM No. 3474 allowed the jury to determine whether Valladares could continue to defend himself because Torres still posed a deadly threat to him. As the trial court noted, the jury was entitled to determine whether Torres was still alive and "disabled" after the first shot, and whether any danger from Torres no longer existed. Finally, the instructions did not negate a self-defense theory. The court instructed on justifiable homicide: self-defense (CALCRIM No. 505), provocation: effect on degree of murder (CALCRIM No. 522); voluntary manslaughter: heat of passion – lesser included offense (CALCRIM No. 570), and voluntary manslaughter: imperfect self-defense – lesser included offense (CALCRIM No. 571). Nothing in CALCRIM Nos. 3472 and 3474 precluded the jury from finding Valladares had an honest but unreasonable belief in the need for self-defense. Nor did the instructions prevent the jury from finding defendant acted with adequate provocation or returning a voluntary manslaughter verdict.

C. *Unanimity Instruction*

The evidence demonstrated Valladares fired two shots in rapid succession. Both wounds were fatal and the coroner could not determine which shot occurred first. Valladares asserts the jury could have found Torres already was dead when Valladares

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fired the second shot, and could have found he did not premeditate and deliberate Torres's murder when he fired the first shot, but did when he fired the second shot. He contends the trial court should have provided a unanimity instruction "to insure the jury unanimously decided which shot killed Torres." (See CALCRIM No. 3500 ["The defendant is charged with [] . The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."].)

"Where the accusatory pleading charges a single criminal offense and the evidence shows more than one such unlawful act [which may have constituted the offense] was committed, [then] *either* the prosecution must elect the specific act relied upon to prove the charge *or* the jury must be instructed . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Martinez* (1988) 197 Cal.App.3d 767, 772; *People v. Diedrich* (1982) 31 Cal.3d 263, 281 [purpose of unanimity instruction is to require agreement among the jurors as to the act or acts which would support a conviction for the charged offense]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 471-472 [possibility of disagreement exists where the defendant is accused of a number of unrelated incidents leaving the jurors free to believe different parts of the testimony and yet convict the defendant].) The trial court must give a unanimity instruction sua sponte where the facts require it. (*People v. Davis* (2005) 36 Cal.4th 510, 561.)

The "'continuous conduct exception'" is a limited exception to the unanimity requirement. "[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266,

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275.) In other words, where there is no evidence from which the jury could have found the defendant guilty of one act, but not the other, *such as where different defenses are asserted as to each*, there is no danger that different jurors would find the defendant guilty of different acts. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 (*Riel*).)

Here, there is no basis to distinguish between Valladares's two gunshots. Valladares's acts in firing two successive shots were substantially identical in nature. Under these circumstances, there simply is no danger that different jurors would find Valladares guilty of different acts. "'[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.'" (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

The jury rejected the only defense (self-defense) offered. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 [unanimity instruction not required where defendant offers essentially same defense to each act and no reasonable basis for jury to distinguish between them].) Valladares did not proceed on the theory he fired the second shot into a dead body, and thus could only have been guilty of murder if he premeditated and deliberated the first shot. Regardless, any conceivable error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The jury unanimously agreed Valladares intended to kill Torres and acted with premeditation and deliberation. There was no reasonable possibility a juror would have found Valladares did not premeditate and deliberate by firing the first shot but that he did so during the second shot.

D. *Refusal to Allow Jury to Test Revolver*

During closing argument, the prosecutor emphasized Valladares took a loaded revolver with him when he went to the bar and invited the jury to "feel the weight of this firearm." She also noted, referring to expert testimony, that "to pull the trigger [in double action mode] you have to actually apply eight and a half to nine pounds to get that

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gun to fire." She noted the expert tested the gun to make sure it would not go off accidentally, and that "everything about this tells you this was not an accident. It was a deliberate point and pull both times."

During deliberations, the jury sent a note to the court asking to "dry-fire the pistol to feel actual trigger pressure?" The prosecutor had no objection but thought "we could be getting close to an experiment." Defense counsel objected: "It seems to me that it is an experiment as far as the pounds of pressure it takes to fire the weapon. And it seems like they just want to conduct their own experiment." Defense counsel even "object[ed] to them holding the gun. I mean it's put in evidence. They can look at the gun. . . . But as far as the weight of the gun, test-firing, dry test firing the gun, I think that all goes to . . . conducting experiments on that gun as far as the weight and amount of pressure it takes to pull that trigger."

The trial court declined to allow the jury to dry fire the revolver. The court primarily relied on defendant's objection, and also noted "I can see some problems with allowing this. Let's assume for instance they find just by the pulling of the trigger that the pressure does not seem to comport with what the witness said, then all of a sudden we're into speculation because we don't have any . . . weighing device." The court declined to prohibit the jury from touching or holding the gun. The court answered the jury's question: "No. Per CALCRIM 201, 'Do not conduct any tests or experiments.' You may handle the firearm but you may not dry-fire it." The court also allowed the bailiff to remove the gun lock, which was not on the revolver when it was presented in court.

"[J]urors may, as a body, 'engage in experiments which amount to no more than a careful evaluation of the evidence which was presented at trial.' . . . [¶] The distinction usually turns on whether the juror's investigation stayed within the parameters of admitted evidence or created new evidence, which the injured party had no opportunity to rebut or question. . . . 'Not every jury experiment constitutes misconduct. Improper

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experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the '"scope and purview of the evidence."' [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted.' [Citation.]" (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1484].)

Cases finding no misconduct include those where jurors employed their own reasoning skills in a demonstrative manner or performed tests in the jury room that were confined to the evidence admitted at trial. (See *People v. Collins* (2010) 49 Cal.4th 175, 250-252 [no misconduct when jurors used string and a protractor to reenact various alternative positions of victim and defendant according to the evidence and drew a scaled diagram based on the evidence for use in deliberations]; *People v. Bogle* (1995) 41 Cal.App.4th 770, 778 [jurors used keys to open a safe, both items admitted into evidence, not misconduct].)

The trial court properly could have allowed the jury to dry fire the revolver to feel the trigger weight. The gun was admitted in evidence, and nothing suggests the weapon was in a substantially different condition at the time of trial than it was at the time the expert tested it. But the court did not abuse its discretion in prohibiting the test. Most significantly, the defense objected to the testing, presumably for tactical reasons. Valladares therefore forfeited or invited any error. Finally, any conceivable error was not prejudicial because the defense did not claim Valladares fired accidentally, and there was no evidence he did.

E. *Cumulative Error*

Valladares argues multiple errors combined to violate his due process right to a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [multiple trial errors

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independently harmless may in combination create reversible error].) As explained above, we have found no error. The cumulative error doctrine therefore does not apply.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.

APPENDIX C